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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1969

GEORGE O. DOWNS, Petitioner, vs. PEOPLE OF THE STATE OF MICHIGAN, Respondent.	No. 858

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PRINTED BY SPEAKER-HINES AND THOMAS, INC., LANSING, MICHIGAN — 1969

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STATEMENT OF QUESTIONS INVOLVED

Respondent accepts the Statement of Questions Involved as presented by the petitioner.

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ARGUMENT

I.

THE STATUTE PERMITTING "GOOD FAITH" DISPENSATION OF NARCOTICS BY A PHYSICIAN IS NOT VOID FOR VAGUENESS.

Petitioner contends that C.L. 1948, Sec. 335.57, MSA Sec. 518.1077(1) is unconstitutional because it is vague and indefinite.

The provision being a part of the Uniform Narcotic Drug Control Act provides that:

> "(1) a physician . . . in good faith and in the course of his professional practice only may prescribe, administer and dispense narcotic drugs. . . ."

Petitioner's contention is in essence that "good faith" is an ambiguous term, dependent for its definition on the exercise of each individual practitioner's medical judgment, and therefore that the statute fails to sufficiently apprise a defendant of what acts are prohibited by it.

The People submit that the term "good faith" has precise meaning both in the law and to "men of common intelligence," *Connolly v General Construction Co.*, 269 US 385, 391 (1926).

Black's Law Dictionary Revised, 4th Ed. 1968, defines good faith as:

> "An honest intention to abstain from taking advantage of another, even through technicalities of law, together with absence of all information, notice, or benefit or belief of facts which render a transaction unconscientious."

The "good faith" concept pervades the law, cutting across the fields of Bankruptcy, Commercial Transactions, Mortgages, and Labor relations. Indeed some reflection suggests that there is not a single area of the law, excepting liability for acts which *malum prohibitum only*, in which "good faith" is not an operative concept, either as a defense or as a requisite to the substantive right.

The concept of good faith thus appears as a basic idea in the law, a standard for measuring the intent of he who seeks redress or relief under the system.

As it operates in the criminal law, "good faith" most frequently appears in the context of a defense asserting the absence of criminal intent. Thus, in *People v. Slayton,* 123 Mich 397 (1900), where defendant was charged with larceny and claimed he had taken the property in question in a good faith belief that he had a legal right to it, the court approved the following instruction defining good faith as it relates to criminal intent, at 399:

> "There can be no crime without criminal intent . . . but fact and circumstance may be taken into consideration by the jury in aiding them to come to a conclusion of the bona fides of the taking of the property. By 'bona fides' I mean the good faith of the taking—*whether with a felonious intent or a criminal intent.*" (Emphasis supplied)

Thus in both criminal and civil litigation it is clear that good faith is uniformly defined as honesty of purpose in the action being examined, *Baker v. Borach,* 297 Mich. 219 (1941).

In *Smith v. State,* 13 NE 2d 562 (1938), a prosecution under the identical provision challenged in this application, the Indiana Supreme Court recognized and applied the uniform definition of good "faith" to the Uniform Narcotic Drug Control Act. Rejecting defendant's contention that the trial court's instruction was erroneous because it did not define good faith, the Court stated at 565:

> "'Good faith' needs no definition other than that implied by the words themselves . . . good faith means 'good intentions and the honest exercise of his [the physician's] best judgment as to the need of his patient;' that errors of judgment are not evidence of lack of good faith. From these instructions, the jury must

> have clearly understood that the good-faith sale or administration of narcotics means sale with lawful intention."

In *People v. Guagliata*, 362 Ill. 427, 432, 200 NE 169 (1936); 103 ALR 1035, appellant, a physician, was convicted of violating the identical provision of the Narcotic Drug Control Act with which the appellant herein is charged. On appeal, appellant contended that the words "good faith" were so vague and ambiguous as to render the statute void. The Court noted that the phrase had been defined "in many cases, in many jurisdictions," and stated

> "The words 'good faith' . . . have a definite and well understood meaning, are free from ambiguity and their use in the act does not violate the due process clause of the State of Federal Constitution."

A fortiori, the decision of the Illinois Court does not have dispositive effect on the holdings of any sister state court, but the People submit that the logic of the *Guagliata* decision, coupled with ample Michigan precedent defining the term "good faith" demonstrate that appellant's claim that the good faith standard is void for vagueness does not present a meritorious basis for granting leave to appeal.

II.

THE STATUTE DOES NOT VIOLATE THE FIFTH AMENDMENT IN THAT IT DOES NOT COMPEL A PRACTITIONER TO TESTIFY IN ORDER TO SHOW THAT HE ACTED IN "GOOD FAITH" IN DISPENSING THE NARCOTIC DRUG.

The contention that petitioner must become a witness in order to prove "good faith" in the dispensing of a narcotic

and that the Drug Act therefore violates the Fifth Amendment, is patently without legal substance.

The statute M.S.A. 18.1077 requires the State to prove beyond a reasonable doubt that

1. The defendant was a physician or dentist;

2. that he dispensed, prescribed, or administered narcotic drugs;

3. in circumstances in which it appears that the dispensation was not done for medical reasons.

These are the elements of the crime and the burden of establishing them is not affected by the language of C.L. 1948, Sec. 335.68, M.S.A. Sec. 18.1088 which provides that in Drug Act proceedings,

> "It shall not be necessary to negative any exception, excuse, proviso, or exemption contained in this act, and the burden of doing so, shall be upon the defendant."

M.S.A. Sec. 18.1077 gives the physician the right to dispense narcotic drugs in good faith, in his practice. The statute thus imposes a duty on a practitioner in dispensing the drugs—a duty to which there is no statutory exception. Petitioner's confusion over the meaning of M.S.A. Sec. 18.1088 apparently derives from the failure to recognize that M.S.A. Sec. 18.1088 refers only to "exceptions, excuses, provisos or exemption. *contained in this act*" (emphasis supplied). Thus, the patent applicability of this section is only to proceedings for enforcement of those provisions of the Drug Act in which the provision itself creates an exception from liability or responsibility.

The People concede that a defendant may also escape liability or responsibility for violation of M.S.A. Sec. 18.1077, by establishing at trial that his actions were done in good faith. This is no more than saying that a defendant may always establish a lack of criminal intent in defense to a felony prosecution.

Thus neither the "good faith" element of the dispensing statute M.S.A. Sec. 18.1077, nor the exception provisions of M.S.A. Sec. 18.1088, cause the burden of proof to shift from the People to defendant.

III.

THE DEFINITION SECTIONS OF THE DRUG ACT ARE NOT AN UNCONSTITUTIONAL DELEGATION OF STATE LEGISLATIVE POWER TO THE FEDERAL GOVERNMENT BECAUSE THEY DEFINE "NARCOTIC" AS THOSE DRUGS DESIGNATED AS SUCH BY THE U.S. BUREAU OF NARCOTICS.

Petitioner contends that Sections 13, 14 & 15 of M.S.A. Sec. 18.1071, the "definitions" sections of the Drug Act violate the Michigan and Federal Constitutions by delegating state legislative power to the Federal Government.

Specifically, petitioner contends that Sec. 13

> "The term 'narcotics' or 'narcotic drugs' means opium. . . . and/or 'synthetic narcotic drugs' which the Bureau of Narcotics of the United States Treasury Department has designated as 'narcotics,' "

gives the federal government the power to supersede the Michigan Statute known as the Drug Act. Petitioner states

that Sec. 14 and Sec. 15[1] which define "Federal Narcotic Laws" and Official Written Order are also delegations of State legislative power to Congress.

The People note initially that Sec. 14 and Sec. 15 of the definition section are purely and simply definitions. They are explanatory only and cannot conceivably be read as a delegation of state power to the Federal Government.

As for Sec. 13, the definition of narcotic by reference to drugs so designated by a federal agency merely establishes a standard for definition.

Neither *Colony Town Club v. Michigan Unemployment Comp. Comm.* 301 Mich 107 (1942) nor *Bean Company v. Unemployment Comp. Comm.*, 308 Mich 636 (1944), when analyzed, are authority for petitioner's contention that the definition sections of the Uniform Drug Act are an unconstitutional delegation of State power.

Each case involves the construction of the Michigan Unemployment Compensation Statute. In each case it was claimed that the statute's reference to the definition of employment as not including that as employment "for purposes of the Social Security Act," had the effect of exempting certain persons from the coverage of the statute, once

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[1]

(14) "Federal narcotics laws" mean the laws of the United States relating to opium, coca leaves, and other narcotic drugs.

(15) Official written order "means an order written on a form provided for that purpose by the United States Commissioner of Internal Revenue under any laws of the United States making provision therefor, if such order forms are authorized and required by federal law, and if no such order form is provided, then on an official form provided for that purpose by the state director of drugs and drug stores.

the federal agency had granted an exemption, and that therefore the State was concluded from enforcing the taxing statute against the individual. In each case the contention was rejected on the ground that the State could not delegate a final and conclusive power to determine the applicability of state law to a federal agency. Thus both cases involves statutes which ostensibly permitted the federal government to conclusively exempt, without review in the state courts, an individual from the coverage of state law.

The reference to federal regulation is not a delegation of power by the legislature, rather it is an expression of the legislative will that the State Drug act parallel and supplement federal narcotic laws, *People v. Gennaro*, 26 NYS 2d 366, 39 NE 283.

Patently the statutes in these cases are not analogous to that of the instant case. The Bureau of Narcotics is not given power to exempt individuals from the applicability of the state law, nor does it provide that the determination of what is "narcotic" is conclusive on the State courts.

Thus, it is clear that there is no legal merit to the contention that Sec. 13, 14 and 15 of M.S.A. 18.1071 are not a delegation of state power to the Federal Government.

IV.

THE MICHIGAN DRUG ACT DOES NOT VIOLATE THE MICHIGAN CONSTITUTION IN THAT IT DOES NOT EMBRACE MORE THAN ONE OBJECT.

The manifest purpose of the Drug Act as expressed in its title, is to control the use and traffic of drugs. The purpose of the constitutional requirement that the object

be expressed in the title is to prevent insertion of clauses into legislation "of which the titles gave no intimation," *People v. Mahoney,* 13 Mich 481, Cooley J.

The thrust of petitioner's contention is that the Constitutional Proviso precludes the legislature from treating the regulation of a single subject matter in one statute. Thus appellant states that legitimate drug use is one "object" and illegitimate drug use is another "object" and they may not be regulated in the same statute. The claim is illogical on its face and totally without support in legal precedent.

RELIEF REQUESTED

Petitioner has failed to present a meritorious legal issue of major significance justifying the allowance of the writ. Wherefore, the People respectfully pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,
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